STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 17, 2009
v	No. 282301 Macomb Circuit Court
DANIEL ARMIJO, Defendant-Appellant.	LC No. 2007-001398-FH

Before: Borrello, P.J., and Meter and Stephens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of third-degree criminal sexual conduct (CSC), MCL 750.520d(1), and sentenced to concurrent prison terms of two to 15 years for each conviction. He appeals as of right. We affirm.

I. Basic Facts

On February 3, 2007, defendant attended a party at the home of the victim and her boyfriend, with about 20 other guests. During the party, the victim became nauseous and eventually went to bed. As the party continued, it was announced that the victim had gone to bed and that all coats had been moved from her bedroom to another room. Several hours later, all the guests had left, except defendant and Ben DeYonker. Both DeYonker and the victim's boyfriend testified that as DeYonker was preparing to leave, defendant indicated that he would stay the night because he "was too drunk to drive." The victim's boyfriend testified that soon thereafter, he fell asleep on the couch as he and defendant were talking.

The victim testified that she awoke to defendant "inserting [his] finger" into her vagina and anus. She explained that she "opened her eyes and saw [defendant] hovering over her bed" as he was pulling his hands away from her genital area and from underneath her cover. The victim yelled, and defendant claimed that he was "coming in to say goodbye and to give her a hug." The victim woke her boyfriend, who testified that he had been sleeping for 30 to 40 minutes; defendant quickly left and the police were contacted. The victim explained that before fully awakening as a result of the two charged incidents, she felt "two other occasions [of physical contact]. One like the first instance [she] just described where [she] felt an insertion into [her] vagina and then into [her] anus. And there was another time where [she] felt someone grab [her] breasts." She woke up during the episode.

Defendant denied any wrongdoing. He claimed that he went into the victim's room to collect his coat, but did not touch the victim. He further claimed that he never intended to stay the night, and left when he did because he had to care for his dog. He admitted that he told DeYonker and the victim's boyfriend that he was too drunk to drive and was going to stay the night, but indicated that he lied to them.

II. Evidence of Past Sexual Conduct

Defendant argues that the trial court abused its discretion and violated his right of confrontation by excluding evidence of the victim's past similar sexual conduct with her boyfriend because it was relevant to the identity of the perpetrator, and to show that the victim merely imagined the incidents. We disagree. This Court reviews a trial court's decision to preclude evidence under the rape-shield statute for an abuse of discretion. See *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984).[1] "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

The rape-shield statute, MCL 750.520j, is generally intended to prohibit evidence of a victim's sexual history with others because such evidence is not relevant to a sexual assault by the defendant. MCL 750.520j(1) provides:

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

In order for a victim's past sexual conduct to be admitted, a defendant must follow the procedures set forth in MCL 750.520j, which states that "the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof." MCL 750.520j(2).

Here, defendant failed to make the requisite offer of proof to justify introduction of the proposed evidence under the rape-shield statute, and the evidence of the victim's past sexual conduct with her boyfriend does not fall within either of the categories of permitted evidence listed in MCL 750.520j(1). In addition, defendant did not provide the notice required by MCL

[1] Defendant argues this issue in the context of the trial court's denial of a motion for a new trial. We review for an abuse of discretion a trial court's denial of such a motion. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994).

750.520j(2). Consequently, evidence of the victim's prior sexual conduct with her boyfriend was not admissible under the rape-shield statute.

We acknowledge that this type of evidence, in some situations, "'may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation.'" *People v Morse*, 231 Mich App 424, 432; 586 NW2d 555 (1998), quoting *Hackett*, *supra* at 348 (emphasis omitted). In these circumstances, a defendant must initially make a showing of relevancy before invoking the constitutional standard. See *Hackett*, *supra* at 350. "If there is a sufficient offer of proof as to a defendant's constitutional right to confrontation, as distinct simply from use of sexual conduct as evidence of character or for impeachment," the trial court shall then determine the admissibility of such evidence in light of the constitutional inquiry. *Id*. The Confrontation Clause[2] does not confer an unlimited right to admit all relevant evidence or cross-examine on any subject. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993).

We agree with the trial court that defendant failed to make the preliminary showing of relevancy necessary to invoke the constitutional standard. The fact that the victim's boyfriend had previously digitally penetrated her vagina was not relevant to her identification of the perpetrator on the night of the incident, nor did it make it more likely that she merely imagined defendant's actions. The victim testified that she awoke because defendant was digitally penetrating her vagina and anus. She unequivocally testified that she saw defendant "hovering" over her and pulling his hand away from her genital area from underneath her cover. In addition, the evidence showed that the victim's boyfriend was sleeping on the couch, and that the victim woke him after the incident. It was also never disputed that defendant was in the victim's home at the time of the incident, and had entered the victim's bedroom. Under the circumstances, the trial court did not abuse its discretion in precluding evidence of the victim's past sexual conduct with her boyfriend because it was not relevant.

III. Prosecutor's Conduct

Defendant also argues that he was denied a fair trial because of the prosecutor's conduct. We disagree. Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29; 650 NW2d 96 (2002). Here, however, this issue is not preserved because although defendant raised this issue in a motion for a new trial, he did not timely object to the prosecutor's conduct at trial. We review unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). This Court will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

A. Shifting the Burden of Proof

[2] US Const, Am VI; Const 1963, art 1 § 20.

Defendant argues that the prosecutor impermissibly questioned him regarding his post-arrest silence and shifted the burden of proof during the following exchange on cross-examination:

Q. This is the first time you have testified with regards to this matter, correct?

A. Yes, sir.

Q. Never at an earlier proceeding did you testify. Today is the first time?

A. Correct.

A prosecutor may not imply that a defendant must prove something or present a reasonable explanation. See *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). Also, testimony concerning a defendant's post-*Miranda*[3] silence is generally inadmissible. *Doyle v Ohio*, 426 US 610, 611; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Crump*, 216 Mich App 210, 214; 549 NW2d 36 (1996). However, testimony regarding a defendant's silence properly may be admitted for a reason other than to contradict a defendant's assertion of innocence. *Id*. at 214-215.

Here, viewing the two questions in context, defendant has not demonstrated a plain error affecting his substantial rights. On cross-examination of the victim and a nurse who examined the victim, defense counsel elicited that the victim reported to the police that before awakening as a result of defendant's actions, she heard a "clicking sound" similar to the sound made by a camera phone. Defendant thereafter testified on direct examination that he has a camera phone, but it is silent when taking pictures. The defense introduced defendant's phone as evidence and demonstrated that it does not make a noise when taking pictures. The trial court gave the prosecutor an opportunity inspect the phone before cross-examining defendant. Apparently, the prosecutor learned that the sound option had been disengaged. The challenged questions were asked in the following context while the prosecutor was holding the phone:

Q. This is the first time you have testified with regards to this matter, correct?

A. Yes, sir.

Q. Never at an earlier proceeding did you testify. Today is the first time?

A. Correct.

Q. This is the first time you have ever offered your phone for inspection, correct?

A. I was never asked by Sergeant Rollo earlier.

Q. You never provided the phone to Sergeant Rollo?

[3] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1996).

A. It was never asked for.

Q. You never provided it to him?

A. Correct.

Q. Now you testified that you never heard your phone make a noise; is that correct?

A. I have not.

Q. Never?

A. Never.

Q. Never heard that kind of noise? You said your phone wasn't equipped with a shutter sound?

A. As far as I knew, no?

Q. Just want to press this for the jury. You can tell me if you hear it. Can you hear that?

A. I heard it.

Q. So your phone is equipped with shutter sound?

A. I know that now, yes.

Q. So you are stating you never knew that before?

A. No . . . .

Viewed in context, the challenged questions were not intended as a comment on defendant's post-arrest silence. Rather, as the trial court aptly noted, the prosecutor attempted to explain why he had no prior knowledge of defendant's camera phone, which the defense introduced as an exhibit. To the extent that the challenged questions could be viewed as improper, the trial court instructed the jury that defendant was not required to offer any evidence or prove his innocence, that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt, and that the lawyers' questions were not evidence. The instructions were sufficient to dispel any prejudice. See *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

B. Denigrating Defendant

Defendant argues that the prosecutor denigrated him during closing argument when he compared him to the soldiers at the Abu Ghraib prison in Iraq:

> We heard defense counsel go into 15 years ago the Defendant got out of the military and has military experience. That should have no basis whatsoever on your judgment of credibility. There is no relevance to that here. Are we really to believe that because a person served in the military that they can't commit a crime? A crime of rape? *Abu Ghraib prison in Iraq, the military personnel raped the prisoners there.*
>
> *The scandal where 20 officers, excuse me, were offenders that were convicted of raping 20 females.*
>
> Military people commit crimes. If that is the case, if we get some special treatment, I should go out and rob a bank, get all that money. So that is not something to focus on.
>
> You should focus on the evidence and what you heard. [Emphasis added.]

A prosecutor may not denigrate a defendant with prejudicial or intemperate comments. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). Here, to the extent that reference to the crimes of soldiers stationed at the Abu Ghraib prison in Iraq was inappropriate and inaccurate, defendant has failed to demonstrate that this brief reference affected his substantial rights. Viewed in context, the prosecutor was addressing defense counsel's implicit assertion that defendant's military service made it improbable that he was guilty, because even military personnel are capable of committing crimes. In his opening statement, defense counsel stated that defendant "served in Desert Storm for four years, did another four years in the service, [and] has never had contact with the criminal justice system." During defendant's direct examination, defendant testified at length and in detail about his military service. In making the challenged remarks, the prosecutor urged the jury to focus on the evidence and argued that defendant's military service was irrelevant and had no bearing on whether he was guilty. The prosecutor's comments must be considered in light of defense counsel's comments, *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997), and otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel, *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Moreover, any prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. See *Watson*, *supra* at 586. Indeed, defendant's right to a fair trial was protected when, in its final instructions, the court instructed the jury that the lawyers' statements and arguments were not evidence, that it was to decide the case based only on the properly admitted evidence, and that it was to follow the court's instructions. *Long*, *supra* at 588.

C. Arguing Facts Not in Evidence

Defendant argues that the prosecutor argued facts not in evidence when he made the following emphasized remarks during closing argument:

> Now defense counsel wants to talk about it is not reasonable that somebody wouldn't wake up. Somebody wouldn't wake up from this; trying to say she is lying. That if the penetration happened, someone would wake up.

That is not necessarily true. The judge is going to tell you when you are considering the evidence to use your common sense and everyday experience. We all know that we have been sleeping and we can sleep through an alarm clock that the alarm is going off, but still sleep through it.

There are different levels of sleep. I think we can all agree to that. And we all know what [the victim] is talking about, what I'm talking about. It may be hard to explain. We all know there are different levels of sleep. You can be aware of the alarm going off and hear the alarm in the morning and still sleep through it and not wake up.

You can go to bed and while you are sleeping hear something on the TV, remember what you heard, not wake up when you hear it, just remember it while you are sleeping. That is reasonable.

That discomfort that may be associated with a vaginal penetration or anal penetration, I'm sure we all have been sleeping and we have to go to the bathroom. We have to urinate and our kidneys hurt, but yet we still sleep through it.

One time I cut myself on the head board [sic]. I knew I cut myself and it hurt. I continued to sleep. And when I woke up, I had blood all of [sic] my hand.

We have, all know what our everyday experiences are in using common sense. It is very reasonable.

* * *

Again, with bruising, I mean just use your own common sense and your own experiences. But just because there is penetration to those areas, doesn't mean that there is going to be bruising. *I have had my colon checked. I didn't feel there was lot of lubricant on that, and I wasn't bruised after that occurred. It was a little discomforting. I wasn't bruised from that.* That is no evidence either. [Emphasis added.]

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). There was no evidence to support the prosecutor's examples of the different levels of sleep or his personal example of the lack of bruising during a medical procedure. However, viewed in the context, the prosecutor's remarks did not affect defendant's substantial rights. The prosecutor's remarks were focused on refuting the defense insinuations made throughout the trial that the victim was not credible because it was impossible for her not to wake up when defendant initially touched her. As noted by the trial court, in both instances, in providing the examples, the prosecutor was urging the jury to use their common sense and everyday experiences when considering the

evidence. Further, although defendant did not object to the remarks, the trial court's instructions protected his right to a fair trial. *Long*, *supra* at 588.[4]

D. Vouching for The Victim

Defendant further argues that the prosecutor impermissibly vouched for the victim's truthfulness throughout closing argument when he indicated that she told the truth. A prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Viewed in context, the challenged remarks did not suggest that the prosecutor had special knowledge that the victim was credible. Rather, the prosecutor's argument was focused on refuting defense counsel's insinuations during the trial that the victim fabricated the charges against defendant and that her testimony was inconsistent and not credible. In making the challenged remarks, the prosecutor urged the jury to evaluate the evidence, discussed the consistency of the victim's testimony, and argued that there were reasons from the evidence to conclude that she was credible. A prosecutor is free to argue from the facts that a witness is credible. See *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996); see also *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In addition, in its final instructions, the trial court instructed the jurors that they were the sole judges of witness credibility. Consequently, this unpreserved claim does not warrant reversal.

IV. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to sustain his convictions because the victim was not credible. We disagree. This Court reviews challenges to the sufficiency of the evidence de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses. *Id*. at 514-515. It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

[4] We note that defense counsel also argued facts not in evidence through the following remarks in closing argument:

> What in the world would justify her not waking up? *I don't know a single woman that I could ask that question to that if somebody came in and grabbed your breast, you wouldn't wake up*. [Emphasis added.]

As applicable to this case, a "person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person" and "[t]he actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless." MCL 750.520d(1)(c). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of a crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

Defendant does not challenge the individual elements of the offenses. Rather, he argues that the evidence was insufficient because the victim was not credible and was "mistaken, dreamt, or imagined the whole scenario," and because there was no physical evidence to corroborate her testimony. Defendant's argument requires this Court to ignore the victim's testimony and to resolve credibility issues anew on appeal. It is well established that absent compelling circumstances, which are not present here, the credibility of witnesses is for the jury to determine. See *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998), and *Wolfe*, *supra* at 514-515. Furthermore, there is no requirement that physical evidence or eyewitnesses corroborate the victim's testimony. Rather, a victim's uncorroborated testimony is sufficient to convict a defendant of CSC. MCL 750.520h; *Lemmon*, *supra* at 632 n 6.

Viewed in the light most favorable to the prosecution, the victim's testimony was sufficient to establish that defendant engaged in sexual penetration with her, contrary to MCL 750.520d(1)(c). The "sexual penetration" element of the two third-degree CSC convictions was satisfied by the victim's unequivocal testimony that she awoke to defendant digitally penetrating her vagina and anus. The evidence was also sufficient to establish that defendant sexually penetrated the victim with knowledge that she was asleep and, therefore, "physically helpless." MCL 750.520a(m) ("'[p]hysically helpless' means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act"). Further, with regard to identity, the victim testified that when she awoke as a result of being sexually assaulted, she saw defendant hovering over her, pulling his hand from her genital area and from underneath her cover. Positive identification by a witness may be sufficient to support a conviction for a crime, and the credibility of identification testimony is a question for the trier of fact that this Court will not resolve anew. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

Although defendant argues that there were alternative ways of viewing the evidence or resolving the case, it was up to the trier of fact to evaluate the evidence, and the prosecutor was not required to disprove every possible theory consistent with innocence. *Nowack*, *supra* at 400; *Wolfe*, *supra* at 533. The evidence was sufficient to sustain defendant's convictions of third-degree CSC.

Affirmed.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Cynthia Diane Stephens